



# **Fair Workweek Ordinance**

## **City of Berkeley**

### **Frequently Asked Questions (FAQ)**

*Updated 01/03/24*

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## Overview

### 1. What is the Berkeley Fair Workweek Ordinance?

The Berkeley Fair Workweek Ordinance guarantees predictable work schedules for many Berkeley employees in certain industries so they can reasonably anticipate their incomes and plan their lives outside of work. This ordinance:

- i. enacts fair and equitable employment scheduling practices in the City of Berkeley;
- ii. provides workers with protections to ensure that employer scheduling practices do not unreasonably prevent them from attending to their families, health, education, and other obligations;
- iii. requires employers needing additional hours to first offer them to current part-time employees.

### 2. When does the Fair Workweek Ordinance become operational?

The ordinance becomes operational on January 12, 2024. Beginning on that date, all Covered Employers must comply with the requirements of the ordinance.

## Covered Employees

### 3. Who is a Covered Employee under the Fair Workweek Ordinance?

The ordinance defines a Covered Employee as any person who performs at least two hours of work per calendar week within the geographic boundaries of Berkeley for a Covered Employer **and**

1. Qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Labor Code Section 1197 and wage orders published by the California Industrial Welfare Commission. Employees shall include learners, as defined by the California Industrial Welfare Commission; and
2. Is (i) not exempt from payment of an overtime rate of compensation pursuant to Labor Code Section 510; and (ii) is not paid a monthly salary equivalent to at least forty hours per week at a rate of pay of twice the minimum wage required by Berkeley Municipal Code Section 13.99.040.

### 4. How do I know if my employer is a Covered Employer under the Fair Workweek Ordinance?

Please see the following section of the FAQ titled **III. Covered Employers**.

### 5. Examples of employees who are and are not covered by the Fair Workweek Ordinance:

**Example 1:** Employee A works two 6-hour shifts per week for a Covered Employer within the Berkeley City limits. Employee A is a non-exempt hourly employee who is subject to the minimum wage laws. Employee A is a Covered Employee under the Fair Workweek Ordinance because Employee A works at least two hours per calendar week for a Covered Employer and is not subject to any of the exceptions in the ordinance's definition of an employee.

**Example 2:** Employee B works for a Covered Employer as a full-time administrative employee who earns a salary and is exempt from the minimum wage laws. Employee B is **not** a Covered Employee under the ordinance because some of the exceptions in the ordinance's definition of an employee *do* apply to Employee B. Employee B is a salaried employee who is exempt from the overtime rate of compensation as defined in Labor Code Section 510.

**Example 3:** Employee C works at least 40 hours every week for a Covered Employer primarily engaged in the healthcare industry. Employee C is a non-exempt hourly employee who can earn overtime rates of compensation, and their hourly rate is \$50. Employee C **is not** a Covered Employee under the ordinance because some of the exceptions in the ordinance's definition of an employee apply to Employee C. Employee C earns the full-time salary equivalent of twice the current Berkeley minimum wage, which is \$18.07 in Fiscal Year 2024. **If Employee C worked fewer than 40 hours per week, Employee C would be** a Covered Employee under the ordinance.

## Covered Employers

### 6. Does the Fair Workweek Ordinance apply to my business? How does the ordinance define a Covered Employer?

The ordinance applies to any employer in the City of Berkeley with 10 or more employees in the City of Berkeley that is:

1. is primarily engaged in the building services, healthcare, hotel, manufacturing, retail, or warehouse services industries, and employs 56 or more employees globally; or
2. is primarily engaged in the restaurant industry, and employs 100 or more employees globally; or
3. is a franchisee primarily engaged in the retail or restaurant industries and is associated with a network of franchises that employ 100 or more employees globally; or
4. a not-for-profit corporation primarily engaged in the building services, healthcare, hotel, manufacturing, retail, warehouse services, or restaurant industries and employs 100 or more employees globally.

### 7. Examples of employers who are and are not covered by the Fair Workweek Ordinance:

**Example 1:** Company A is a non-franchise retail business with two locations total, both in the City of Berkeley and each with 25 employees. Company A **is not** a Covered Employer under the Fair Workweek Ordinance because Company A is an employer primarily engaged in the retail industry that does not have 56 or more employees globally.

**Example 2:** Company B owns one franchise restaurant in Berkeley with 15 employees and is associated with a network of franchises that employs more than 100 people globally. Company B **is** a Covered Employer because Company B is primarily engaged in the restaurant industry, has at least 10 employees in Berkeley, and is associated with a large global franchise.

**Example 3:** Company C owns three non-franchise restaurants: one in Berkeley with 20 employees and two in Oakland with 40 employees each. Company C **is** a Covered Employer because Company C is primarily engaged in the restaurant industry, has at least 10 employees within the City of Berkeley, and has exactly 100 employees globally.

**Example 4:** Company D owns four warehouses, one of which is located in the City of Berkeley. The Berkeley warehouse employs 12 workers, and the other three warehouses employ 10 workers each. At its headquarters, Company D has 10 salaried administrative employees and 5 temporary employees. Company D **is** a Covered Employer because Company D is primarily engaged in the warehouse services industry, has 10 or more employees in Berkeley, and has 57 employees globally. When determining the total number of employees your business has globally, count all individuals (not FTEs), including salaried, executive, and temporary employees.

**Example 5:** Company E is an affordable housing non-profit in the City of Berkeley that has 10 janitorial employees. Company E **is not** a Covered Employer because Company E is primarily engaged in affordable housing, which is not one of the covered industries under the ordinance. Company E is not a Covered Employer even though some of its

employees provide building services.

**8. How do I count the number of employees I have in Berkeley and the number of employees the business or franchise has globally?**

In determining the number of employees that a business or franchise has globally, all employees performing work for compensation on a full-time, part-time, or temporary basis at any location, including employees made available to work through the services of a staffing agency, should be counted. This is a count of all individual employees, not Full Time Equivalencies (FTEs).

## **Advance Notice of Work Schedules**

**9. What is the initial estimate of minimum hours? Do Covered Employers need to provide initial estimates to existing employees as well as new employees?**

The initial estimate of minimum hours is a good faith estimate of an employee's schedule, provided by the Covered Employer to each employee in writing. Covered Employers must provide new employees with an initial estimate prior to their first day of work or on their first day of work. Existing employees who are newly covered by the Fair Workweek Ordinance should receive their initial estimate by January 12, 2024, the operational date of the ordinance.

**10. For regular work schedules, how much advance notice should a Covered Employer provide to Covered Employees?**

Covered Employers should provide Covered Employees with at least two weeks (14 days) of advanced notice of their work schedules. The schedule may either be posted in a location in the workplace that is accessible to all employees or it may be electronically transmitted (for example through a text, email, or shared electronic calendar) as long as employees also have access to the schedule somewhere in the workplace. Covered Employers must retain copies, whether paper or electronic, of all schedules going back at least three years.

## **Schedule Changes and Predictability Pay**

**11. Can a Covered Employee decline schedule changes made by their employer with less than two weeks' (14 days') advance notice?**

Yes. Except in certain situations described below in **VI. Exceptions**, a Covered Employee has the right to decline hours that their employer adds to their schedule without at least 14 days' advance notice.

**12. What is Predictability Pay?**

Predictability Pay is additional compensation that a Covered Employer must pay a Covered Employee when the employer adds a previously unscheduled shift to an employee's schedule, adds or subtracts hours from an employee's schedule, moves an employee's shift to another date or time, or cancels an employee's shift without providing the required amount of notice.

Different circumstances require different amounts of predictability pay:

- a. If the employer gives **less than 14 days' but at least 24 hours' notice** to an employee of a schedule change, the employer owes the employee 1 hour of predictability pay, no matter what kind of schedule change it is (adding or subtracting hours, adding or cancelling a whole shift, etc.).
- b. If the employer cancels an employee's shift or reduces the hours in a shift with **less than 24 hours' notice**, the employer owes the employee 4 hours of predictability pay or the number of hours reduced from the employee's schedule, whichever is less.
- c. If the employer adds a whole shift, adds hours to a shift, or moves a shift with **less than 24 hours' notice**, the employer owes the employee 1 hour of predictability pay.

**13. What is the "regular rate of pay" used to calculate predictability pay?**

"Predictability pay" shall mean wages paid to an employee, calculated on an hourly basis at the employee's regular rate of pay as that term is used in [29 U.S.C. Section 207 \(e\)](#). Predictability pay is in addition to any wages earned for work performed by that employee.

**14. If an employer cuts an employee 15 minutes early, does the employer owe 15 minutes of predictability pay or an entire hour?**

The employer owes the employee 15 minutes of predictability pay because the predictability pay for a shift reduction with less than 24 hours' notice is "four hours or the number of cancelled or reduced hours in the employee's scheduled shift, whichever is less." Therefore, the employer owes 15 minutes or 0.25 hours of predictability pay.

## Exceptions

**15. Does a Covered Employer owe predictability pay if employees swap shifts or make arrangements to get shifts covered?**

No. Employee-initiated changes like shift swaps or coverage arrangements do not require the employer to pay predictability pay.

**16. Does a Covered Employer owe predictability pay if a Covered Employee requests to leave a shift early, take a sick day, or take a vacation day?**

No. These are examples of employee-initiated changes where the employer would not owe predictability pay.

**17. Is there a grace period before and after a shift when a Covered Employer does not owe predictability pay?**

Yes. To accommodate shift transitions, Covered Employees may start 10 minutes before a shift begins and finish 10 minutes after a shift ends without being owed predictability pay. An employee may stay longer than 10 minutes after a shift ends to complete service to a customer without being owed predictability pay as long as the employee works no more than 30 minutes after the shift ends.

Employers must compensate employees for every minute worked, even in situations where additional predictability pay is not owed.

## Offer of Work to Existing Employees

**18. As a Covered Employer, what are my obligations to existing part-time employees when I need additional hours covered?**

Covered Employers must offer additional work hours to existing part-time employees before hiring new staff members or temporary workers. An “existing part-time employee” is defined by the Fair Workweek Ordinance as someone who has worked for the Covered Employer for more than two weeks, is qualified to do the additional work, and whose current work hours do not conflict with the newly available work hours.

**19. As a Covered Employer, how should I distribute work hours among existing part-time employees? Who counts as a full-time employee?**

The additional hours may be distributed among existing part-time employees at the employer’s discretion as long as the employer does not discriminate and does not avoid giving an employee 30 or more hours per week in order to avoid granting benefits to that employee. There is no obligation for Covered Employers to distribute additional work hours on a seniority basis.

The ordinance does not obligate Covered Employers to offer additional hours at a premium rate, such as overtime. Therefore, when an existing part-time employee reaches 8 hours in one day or 40 hours in one week, the employer is no longer required to offer that employee additional hours on that day or in that week.

**20. As a Covered Employer, how much time must I give each existing part-time employee to decide whether to pick up additional hours?**

Covered employees must be given 24 hours to decide whether or not they would like to pick up additional hours that the employer has offered. The employer may offer hours to employees individually and wait 24 hours for a response from each employee, or the employer may post the offering of additional hours in a conspicuous location in the workplace or electronically where notices to employees are customarily posted in order to make additional hours available to existing part-time employees on a first come, first served basis. The employer must make the offer in writing, and employees must accept the offer in writing.

**21. As a Covered Employer, am I required to offer hours of specialized work to existing part-time employees who do not have the appropriate skills to perform that labor?**

No. A Covered Employer has the discretion to determine which employees are qualified to perform the additional work hours that are needed. The employer must make these determinations reasonably, in good faith, and must not discriminate.

## Right to Rest

**22. I am a Covered Employee who has been given a closing shift and an opening shift with less than 11 hours of rest in between. Can I decline the second shift?**

Yes. Covered Employees have the right to decline work hours that occur less than 11 hours after the previous shift.

**23. I am a Covered Employee and I have agreed to a closing shift one night and an opening shift the following day. Does my employer owe me premium pay?**

For every hour worked less than 11 hours after the end of the previous shift, an employee should be paid time and a half. If you close at midnight on Saturday and open at 8am the following Sunday, you should earn 1.5 times your regular rate of pay for the 3 hours between 8am and 11am on Sunday.

- 24. I am a Covered Employer who asked an employee to pick up a shift with less than 24 hours' notice, AND that shift will result in less than 11 hours' rest between shifts. Do I owe the employee time and a half for any hours worked without 11 hours' rest AND predictability pay? If so, how is that predictability pay calculated?**

Yes. You would owe the employee time and a half for hours worked without 11 hours' rest AND an hour of predictability pay for adding work hours without 24 hours' notice. Predictability pay is always calculated using the regular rate of pay, not any premium rate of pay, so it would be calculated in this situation the same way it would be calculated in situations that do not require time and a half.

- 25. I am a Covered Employer with staff who work in multiple locations, both within Berkeley and outside of Berkeley. If an employee ends one shift in Oakland at midnight and starts the next shift in Berkeley at 8am, would I owe that employee time and a half for the hours worked with less than 11 hours' rest?**

No, the Fair Workweek Ordinance only applies to work conducted within the geographic boundaries of the City of Berkeley.

- 26. If employees swap shifts in an employee-initiated schedule change and this results in a short rest between shifts for one of the employees, does a Covered Employer owe that employee time and a half for the hours worked with less than 11 hours' rest? Can a Covered Employer reject an employee-initiated change that will result in premium pay for an employee?**

The Fair Workweek Ordinance does not obligate Covered Employers to offer additional hours or allow employee-initiated schedule changes that will result in premium pay, such as overtime or predictability pay. An employer may reject an employee-initiated change that would result in the employer owing time and a half to one or more employees. If the employer accepts this employee-initiated change, the employer *does* owe the employee(s) time and a half for any hours worked with less than 11 hours' rest.

## **Flexible Work Arrangements**

- 27. As a Covered Employer, am I required to accept an employee's request for a flexible work arrangement?**

Employees have the right to request a modified work schedule, which might include adding or subtracting hours or shifts, changing days of work or changing start or end times, swapping shifts with other employees, or changing work duties. Employers may accept, modify, or decline the employee's request.

The Berkeley Family Friendly and Environment Friendly Workplace Ordinance ([BMC 13.101](#)), which applies to all employers within the City of Berkeley who regularly employ 10 or more employees, to meet with an employee within 21 days of the requested schedule modification and submit their response to the employee in writing.

## **Implementation and Enforcement**

- 28. Are there exceptions for Covered Employees who are also covered under a Collective Bargaining Agreement or union contract?**

The Fair Workweek Ordinance applies to all Covered Employees, including employees represented by a union unless the employees' Collective Bargaining Agreement (CBA) specifically waives all of the ordinance or some portions of the ordinance. Such a waiver must be set forth in the CBA explicitly and in clear and unambiguous terms.

**29. I am a Covered Employee and I think my employer has violated the Fair Workweek Ordinance. What should I do?**

Covered Employees who suspect that their employer may have violated the ordinance should contact City of Berkeley Labor Standards Enforcement staff immediately and submit a complaint in writing. The City will keep the employee's information confidential.

**City of Berkeley Labor Standards Enforcement**

**Email:** [Rules4work@cityofberkeley.info](mailto:Rules4work@cityofberkeley.info)

**Phone:** (510) 981-5400, TDD: (510) 981-6903, Fax: (510) 981- 5450

**Website:** <https://berkeleyca.gov/doing-business/operating-berkeley/workforce-standards-and-enforcement>